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**Sub-Acute Rehabilitation Center at Kearny, LLC  
d/b/a Belgrove Post Acute Care Center and Dis-  
trict 1199J NUHHCE, AFSCME, AFL-CIO.  
Case 22–CA–093626**

December 9, 2015

**DECISION AND ORDER**

**BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND MCFERRAN**

This is a refusal-to-bargain case in which the Respondent is contesting the Union’s certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by District 1199J NUHHCE, AFSCME, AFL–CIO (the Union) on November 23, 2012, the Acting General Counsel issued the complaint on December 4, 2012, alleging that Sub-Acute Rehabilitation Center at Kearny, LLC d/b/a Belgrove Post Acute Care Center (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union’s request to recognize and bargain following the Union’s certification in Case 22–RC–080916. (Official notice is taken of the record in the representation proceeding as defined in the Board’s Rules and Regulations, Secs. 102.68 and 102.69(g). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On December 21, 2012, the Acting General Counsel filed a Motion for Summary Judgment. On December 26, 2012, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

On March 13, 2013, the National Labor Relations Board issued a Decision and Order in this proceeding, which is reported at 359 NLRB No. 77. Thereafter, the General Counsel filed an application for enforcement in the United States Court of Appeals for the Third Circuit.

At the time of the Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court’s decision.

On November 25, 2014, the Board issued a Decision, Certification of Representative, and Notice to Show Cause in these proceedings.<sup>1</sup> That Decision provided leave to the General Counsel to amend the complaint on or before December 5, 2014, to conform with the current state of the evidence, including whether the Respondent had agreed to recognize and bargain with the Union after the November 25, 2014 certification of representative issued.

On January 8, 2015, the Respondent filed its response to the Notice to Show Cause and its opposition to the motion for summary judgment. Noting that the General Counsel had not filed an amended complaint, the Respondent argued that summary judgment could not be granted because the prior certification was “invalid,” that the Board could not rely upon an invalid certification to find a refusal to bargain, and that there was no evidence that the Union had requested bargaining after the Board’s November 25, 2014 Decision, Certification of Representative, and Notice to Show Cause. The Respondent also reiterated certain representation and procedural arguments that the Board had considered and rejected in its November 25, 2014 Decision.

On February 4, 2015, the General Counsel filed a motion to amend the complaint, under Section 102.17 of the Board’s Rules and Regulations. The General Counsel stated in his motion that the December 5, 2014 date given for amending the complaint was not able to be met, but that the amendment was necessary in light of events that occurred after that date. The General Counsel further asserted that granting this motion to amend would not result in prejudice to any party. The complaint attached to the General Counsel’s motion had been amended in relevant part to include the allegations that about January 26, 2015, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit employees, and that about January 30, 2015, the Respondent refused to do so, and continues to refuse to do so.

On February 6, 2015, the Respondent filed an opposition to the General Counsel’s motion for leave to amend the complaint, arguing that because the General Counsel did not move to amend the complaint by December 5, 2014, the case should be dismissed and a new charge filed regarding any postcertification refusal to bargain. The Respondent challenged the General Counsel’s assertion that no prejudice would result from granting the motion to amend, claiming that it has invested time, effort, and money in drafting a response to the Board’s order. The Respondent additionally contended that Section

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<sup>1</sup> 361 NLRB No. 118.

102.17 of the Board's Rules does not provide a basis to allow an amendment. On February 18, 2015, the General Counsel filed a reply.

On May 26, 2015, the Board issued an Order Granting Motion to Amend Complaint and Further Notice to Show Cause in which it accepted the amended complaint, and directed that the Respondent file an answer to the amended complaint on or before June 9, 2015, and that cause be shown, in writing, on or before June 16, 2015, as to why the General Counsel's Motion for Summary Judgment should not be granted by the Board.

On June 9, 2015, the Respondent filed an answer to the amended complaint in which it admitted the factual allegations of the complaint,<sup>2</sup> reiterated certain representation and procedural arguments that the Board had considered and rejected in its November 25, 2014 Decision, Certification of Representative, and Notice to Show Cause,<sup>3</sup> and asserted various affirmative defenses. Thereafter, upon the Respondent's motion, the Board extended the due date for the response to the Notice to Show Cause to June 30, 2015. On June 30, 2015, the Respondent filed its response to the Notice to Show Cause and in opposition to the motion for summary judgment, and the General Counsel filed a statement in support of the motion for summary judgment.<sup>4</sup>

<sup>2</sup> Although the Respondent purported to deny the factual allegations regarding the Union's certification and bargaining demands and its refusals to bargain, it set forth "exceptions" in which it admits the same factual allegations. In so doing, we find that the Respondent has admitted the factual allegations of the complaint, but denies the legal sufficiency of those facts to support an unfair labor practice finding.

<sup>3</sup> 361 NLRB No. 118, slip op. at 1-2.

<sup>4</sup> In its answer to the amended complaint, the Respondent asserts 15 affirmative defenses. The first and second affirmative defenses reiterate the Respondent's previously rejected argument that the charge was not properly served. 361 NLRB No. 118, slip op. at footnote 1.

The third affirmative defense raises the previously considered argument that the panel that decided the initial request for review in Case 22-RC-080916 was not properly constituted. The Board addressed this argument in its November 25, 2014 Decision by considering the Respondent's Request for Review de novo and finding the Respondent's arguments to be without merit. 361 NLRB No. 118, slip op. at 1.

The fourth affirmative defense argues that the Regional Director lacked jurisdiction to issue a certification on September 19, 2012, because the Board lacked a quorum at that time. We reject this argument as the authority of the Regional Director is not dependent upon the presence of a quorum. See *Durham School Services, LP*, 361 NLRB No. 66 (2014). Indeed, Sec. 102.178 of the Board's Rules and Regulations provides that "during any period when the Board lacks a quorum normal Agency operations should continue to the greatest extent permitted by law," and Sec. 102.182 provides that representation cases should be processed to certification "to the extent practicable." 361 NLRB No. 118, slip op. at 2.

In addition, in its answer to the amended complaint and in its response to the Notice to Show Cause, the Respondent argues vigorously that the certification of representative issued by the Regional Director on September 19, 2012, was "invalid" because the Board lacked a quorum at that time. Subpart X of the Board's Rules and Regulations

### Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its contention in the underlying representation proceeding that the licensed practical nurses in the unit are supervisors and the bargaining unit is therefore inappropriate. The Respondent also asserts numerous affirmative defenses which are rejected for the reasons stated above.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to ad-

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expressly provides that during periods when the Board lacks a quorum representation cases should continue to be processed to certification "to the extent practicable." Sec. 102.182 states that such a certification is "subject to revision or revocation by the Board pursuant to a request for review filed in accordance with [Subpart X]." Thus, absent a contrary determination by the Board, such a certification is not "invalid." The Respondent's suggestion that Subpart X does not apply because of the *reason* the Board lacks a quorum is rejected. Subpart X was adopted for the express purpose of allowing normal Agency operations to continue during any period when the Board lacks a quorum. The reason the Board lacks a quorum is irrelevant.

The fifth through the twelfth affirmative defenses raise previously rejected representation issues regarding the appropriateness of the unit. 361 NLRB No. 118, slip op. at 1.

The thirteenth affirmative defense argues that the Board erred in allowing the General Counsel to amend the complaint to conform with the current state of the evidence without the Union having filed an amended charge. We reject this argument. The General Counsel's amendment to the complaint was expressly contemplated by the Board's November 25, 2014 Decision, Certification of Representative and Notice to Show Cause. Moreover, we find that the allegations in the amended complaint are part of a continuum of events that begin with the filing of a petition for a representation election in Case 22-RC-080916 and culminate with the Respondent's ongoing refusal to recognize and bargain with the Union for the purpose of testing the Board's certification of representative. These events are sufficiently related to the original charge in this matter to be included in the amended complaint. See *Ozburn-Hessey Logistics, LLC*, 362 NLRB No. 118 (2015).

The fourteenth affirmative defense asserts that the Board failed to follow its Rules and Regulations "including by a May 26, 2015 order requiring the Company to file an answer to the amended complaint and then providing that the Company should then file its opposition to the General Counsel's motion for summary judgment." In its response to the Notice to Show Cause, the Respondent argues that this procedure, which the Board has followed in numerous cases, improperly places the Board in the role of prosecuting this case. Although the Respondent does not cite any case or any of the Board's Rules and Regulations to support its argument, it appears to have conflated its thirteenth and fourteenth affirmative defenses to assert that in the absence of a new charge and a new investigation the Board cannot consider the current state of the evidence in ruling on the General Counsel's motion for summary judgment. We reject this argument. As stated above, these recent events are part of an ongoing continuum of events and we find that they are properly before the Board for consideration.

The fifteenth affirmative defense alleges that the Board's November 25, 2014 Decision, Certification of Representative, and Notice to Show Cause improperly relied on the results of the election in Case 22-RC-080916. We reject this argument for the reasons stated in that Decision. 361 NLRB No. 118, slip op. at 2.

duce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.<sup>5</sup>

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent, a New Jersey limited liability company with an office and place of business in Kearny, New Jersey, has been engaged in the operation of a 120-bed long-term care and sub-acute nursing facility.

During the 12-month period preceding the filing of the unfair labor practice charge, the Respondent derived gross revenues in excess of \$100,000, and purchased and received at its Kearny, New Jersey facility goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union, District 1199J NUHHCE, AFSCME, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. The Certification

Following the representation election held on July 26, 2012, the Union was certified on November 25, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time, regular part-time, and per-diem Licensed Practical Nurses employed by the Employer at its Kearny, New Jersey facility, excluding all other employees, guards and supervisors as defined by the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

###### B. Refusal to Bargain

About October 22, 2012, verbally, and by letters dated November 16, 2012, and January 26, 2015, the Union requested that the Respondent recognize and bargain

<sup>5</sup> Therefore, the Respondent's request to dismiss the complaint is denied.

with it as the exclusive collective-bargaining representative of the unit. Since about October 22, 2012, and continuing to date, the Respondent has failed and refused to do so.

We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.<sup>6</sup>

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

#### ORDER

The National Labor Relations Board orders that the Respondent, Sub-Acute Rehabilitation Center at Kearny, LLC d/b/a Belgrove Post Acute Care Center, Kearny,

<sup>6</sup> In *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Board stated:

Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad faith effort by the employer to avoid its bargaining obligation.

We find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with District 1199J NUHHCE, AFSCME, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time, regular part-time, and per-diem Licensed Practical Nurses employed by the Employer at its Kearny, New Jersey facility, excluding all other employees, guards and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its Kearny, New Jersey facility copies of the attached notice marked “Appendix.”<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 22, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 22 a sworn certification of a responsible official on a form provided by the

Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 9, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with District 1199J NUHHCE, AFSCME, AFL–CIO as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time, regular part-time, and per-diem Licensed Practical Nurses employed by us at our Kearny, New

<sup>7</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Jersey facility, excluding all other employees, guards and supervisors as defined by the Act.

Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

SUB-ACUTE REHABILITATION CENTER AT  
KEARNY, LLC D/B/A BELGROVE POST ACUTE  
CARE CENTER

The Board's decision can be found at [www.nlr.gov/case/22-CA-093626](http://www.nlr.gov/case/22-CA-093626) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor

